

**Some Background**

1. Before any “utility” may build a “thermal” power plant in the state of Arizona that generates 100 megawatts (A.R.S. §40-360(9)) or more electricity, or build a transmission line that carries nominal voltages of 115 kilovolts or more of electricity (A.R.S. § 40-360(10)), the “utility” must apply for and obtain a Certificate of Environmental Compatibility or CEC. A.R.S. §§ 40-360.03 and - 360.07(A).
  - 1.1. CEC is issued by the Arizona Power Plant and Transmission Line Siting Committee. A.R.S. § 40-360.07(A).
  - 1.2. CECs granted by the Committee are to be, “affirmed and approved by an order of the [Arizona Corporation C]ommission which shall be issued ... after the certificate is issued by the committee, except [if a party timely files a] request [for] review of the committee’s decision by the commission.” A.R.S. § 40-360.07(A).
  - 1.3. The statute assumes only a “utility” would be interested in building a power plant or transmission line.
    - 1.3.1. Note, the definition of “utility” in the line siting statute is different than the one found in A.R.S. § 40-256(F)(7) which defines a “utility” for rate making and other regulatory purposes.
2. Most of the issues associated with process lead back to :
  - 2.1. The legislature gave the Committee no staff, no budget, no investigative power, no enforcement power, and no power to make its own rules of procedure.
  - 2.1. Except for the size and membership on the Committee, neither the statute nor the rules of procedure for the Committee promulgated by the Commission have been significantly revised since the early 1970s. See, A.R.S. § 40-360 et seq. and R14-3-201 et seq., Arizona Administrative Code.
3. Since the legislature passed A.R.S. § 40-360 et seq. in 1971, the world of power production and transmission has changed dramatically.
  - 3.1. Power production has been uncoupled from distribution and delivery. Entities other than traditional retail power suppliers are now involved in constructing power plants and transmission lines. These entities are not regulated by the Commission with its rate making authority which is “exclusive and plenary.” See, *Tucson Elec. Power Co. v. Arizona Corp. Com’n*, 132 Ariz. 240, 645 P.2d 231 (1982).
  - 3.2. Global warming is an international issue of importance.

- 3.3. A state, national and international trend toward renewable energy exists. Arizona has a Renewable Energy Standard.
- 3.4. "September 11" demonstrated a real threat of terrorism exists within the United States.
- 3.5. A trend also exists toward a "smart grid," efficiency in power transmission and usage through the use of computers. But, the vulnerability of computers to hacking from domestic and foreign unauthorized users has emerged as serious global problem.
- 3.6. Arizona's population and economy have changed dramatically since 1971.
- 3.7. The Committee is a "public body" within the meaning of A.R.S. § 38-431 et seq. and A.R.S. § 39-121.01. Therefore, Arizona's Open Meetings Law and Public Records Law which were enacted after the line siting statute apply.
4. How is Arizona's power plant and line siting process working in today's changing world? And, how will it work in the future? Surprisingly, no one has made a serious attempt to study the process systematically. A preliminary review of the statute was made in 1973. See, Comment, *Power Plant and Transmission Line Siting: Improving Arizona's Legislative Approach*, 1973 Law & Soc. O. 519. [Note, the recommendation in 1973 that A.R.S. § 40-360(8) be broadened to include "new generating devices." 1973 Law & Soc. O. 519, 522 fn. 14.]

### **Some History**

5. The Attorney General of Arizona was originally selected to be the chairman of the Committee. In 1996 the statute was modified to explicitly authorize a practice followed since the second application was filed in 1972 of allowing the attorney general and other agency heads to designate someone to serve for them. A.R.S. § 40-360.01.
  - 5.1. The size of the Committee has varied from twenty-one members in 1971, to twenty-five members in 1982, to eleven members from 1996 until today. A.R.S. § 40-360.01.
  - 5.2. Designees from the Director of Energy office of the Department of Commerce, the Department of Environmental Quality, and the Department of Water Resources join the designee of the Attorney General now sit on the Committee.
  - 5.3. The Chairman of Arizona Corporation Commission designates one member personally and, in addition, the Commission designates six members. One represents cities and towns, one counties, one agriculture and three represent the public in general.
  - 5.4. The statutory requirements and application process require regular input from the Arizona Land Department, the Arizona Game and Fish Department and the Arizona State Historical Preservation Office. Originally, they had representatives on

the Committee. They lost their representatives in 1996. Chapter 168, 42 Arizona Legislature, Second Regular Session, 1996.

6. Historically, one hundred fifty-four applications have been filed since 1971. The CEC in #151 will be finalized this afternoon.
  - 6.1 Almost all the applications have been granted or granted as modified by the Committee.
    - 6.1.1. Applications #13 and #14 were for facilities that were built in 1974 without Certificates of Environmental Compatibility being granted because the Committee did not file a written decision within 180 days after the application was filed as required by A.R.S. § 40-360.04(D).
    - 6.1.2. Applications #53 and #76 were withdrawn before a formal decision was rendered.
    - 6.1.3. Application #80 was not approved after a hearing.
    - 6.1.4. Application #100 (the Big Sandy gas plant) was denied by the Committee by a majority vote.
    - 6.1.5. A file for Application #134 was opened in error.
  - 6.2. The earlier CECs contained relatively few conditions. In the recent past, CECs have included significant conditions. A.R.S. § 40-360.06(A) authorizes the imposition of conditions.
  - 6.3. The evolving language of the conditions contains some of the most important information about the thinking of the Committee and Commission on the application process.
7. Other trends:
  - 7.1. Since July 1, 2008, the Committee has considered six applications for solar thermal generators. It has granted all six with significant conditions. The final approval of #151 should be this afternoon. One was only for concentrating solar power ("CSP") technology. Five were for CSP or photovoltaic ("PV") in the alternative. All the CSP proposals were wet cooled. All used existing groundwater or irrigation authorizations that were less than the alternative historical water use except for #151. The estimated costs of the projects ranged from \$500 million to \$2.2 billion each. The time from filing the application until filing the CEC after the Committee decision is about 62 days. The hearings are lasting between one and three days.
  - 7.2. Since the beginning of 2000, the Commission has modified CECs granted by the Committee 28 times. Before 2000, it modified CECs granted by the Committee only twice.

- 7.3. Some of the projects for which CECs have been granted have not been built. It is not clear why. Further study would be helpful.
- 7.4. The process has so far been timely, that is, it has been accomplished in 180 days or less lengthened only by agreement of the applicant. The average time from the date the application is filed until the date the Committee's CEC is filed in all cases since July 1, 2008 is less than 80 days.
- 7.5. However, the ability of the parties to prepare and present the needed material to the Committee is becoming progressively more difficult to accomplish in all cases.
  - 7.5.1. Application #22 hearing authorizing the three presently operating nuclear generation facilities at the Palo Verde nuclear plant took two and a half days in 1975.
  - 7.5.2. Application #40 hearing authorized the construction of two more nuclear generators at the Palo Verde site that have not as yet been built took one day, November 2, 1978.
- 7.6. Application #138 hearing started in August of 2008 and continued for sixteen day spread over five months. Seventeen parties intervened. None were individuals. The intervening parties included the Arizona Corporation Commission Staff, two municipalities (Peoria and Surprise), the Arizona State Land Department, and fourteen private developers or home owners associations whose properties and investments were impacted by the proposed transmission line placement. Eighteen entities could call witnesses, cross-examine witnesses, present documentary evidence, make objections, make opening statements, and give closing arguments. Application #148 started in August of 2009. Three towns, a county, an airport authority and a private land owner intervened. The hearing required eight days of hearings spread over two months.
- 8. The trend is toward more cases like #138 and #148 in the future which will become more difficult to process.
  - 8.1. One reason will be an increased desire of individuals and interest groups to participate as parties.
  - 8.2. Three methods exist for public participation in line siting hearings:
    - 8.2.1. A.R.S. § 40-360.05(A)(4) authorizes the Committee to grant intervention as a party "at any time." R14-3-204A requires a person to make a request to appear as a party at least ten days before the hearing is scheduled. Hearings must begin not less than thirty nor

- more than sixty days after the application is filed. A.R.S. § 40-360.04(A). If a party intervenes at the last moment it creates the potential for delay while witnesses and exhibits are disclosed to the other parties.
- 8.2.2. A.R.S. § 40-360.05(B) authorizes a limited appearance which amounts to a sort of public statement.
  - 8.2.3. A.R.S. § 38-431.01(H) allows but does not require public comment.
  - 8.3. However, neither the Committee nor the Commission is allowed to base a decision upon public comment.
    - 8.3.1. The Committee “shall receive under oath and before a court reporter the material, nonrepetitive evidence and comments of the parties....” A.R.S. § 40-360.04(C). The Committee “shall review and consider the transcript of the public hearing or hearings” in making its decision. A.R.S. § 40-360.04(D).
    - 8.3.2. When the Commission reviews a decision of the Committee “[t]he committee shall transmit to the commission the complete record, including a certified transcript, and the review shall be conducted on the basis of the record.” (Emphasis added.) A.R.S. § 40-360.07(B).
  - 9. A.R.S. § 40-360.06 and -360.07 appear to be balancing statutes.
    - 9.1. A.R.S. § 40-360.06 lists factors Committee “shall consider” in deciding whether to grant a CEC.
      - 9.1.1. Never says who has the burden of proving the factors to be balanced.
      - 9.1.2. Never says what level of proof is required to prove any factor.
      - 9.1.3. Never says what factors are balanced against what factors.
      - 9.1.4. Never says what weight is to be given to factors that are found when they are balanced.
      - 9.1.5. Never lists “need” as a factor. However, in *Grand Canyon Trust v. Arizona Corporation Commission*, 210 Ariz. 30, 107 P.3d 356 (App. 2005) the court of appeals confirmed that the Committee could consider “need” in its deliberations. 210 Ariz. at 35, ¶ 17, fn. 7.

### **Some Problems**

- 10. Coverage or jurisdiction issues.
  - 10.1. A.R.S. § 40-360 limits coverage of the line siting process to

- “thermal” generators. Solar photovoltaic and wind generation are not covered.
- 10.2. Neither the Committee nor the Commission has explicit legislative authority to enforce the conditions.
  - 10.2. Neither the Committee nor Commission has explicit statutory authority to determine whether applicants for CECs are “fit and proper” to discharge the responsibilities of constructing or operating the power plant or transmission line. What about entities to which the applicant might transfer the CEC? A.R.S. § 40-360.08(A). Should the Committee and Commission have explicit statutory authority:
    - 10.2.1. To determine whether the applicant has the technical expertise or the financial stability to build or operate the facility?
    - 10.2.2. To inquire whether the applicant is linked to a foreign government?
    - 10.2.3. To determine whether anyone associated with the applicant has a criminal record?
    - 10.2.4. To determine whether the applicant or anyone associated with the applicant has been disciplined by another state for inappropriate activity in building or operating a power plant or transmission line?
  - 10.3. Should the Committee and Commission have explicit statutory authority to consider:
    - 10.3.1 Global climate change?
    - 10.3.2. The security of the facilities from natural or man-made disasters?
    - 10.3.3. The security of the power grid from outside control or damage through the use of computer hacking or communication signals interception?
    - 10.3.4. Whether the burden of cost or environmental impact would be borne unfairly by any group of citizens of Arizona who are disadvantaged because of race, ethnicity or economic status?
    - 10.3.5. The affect on retail electricity rates? A.R.S. § 40-360.06(A)(8).
    - 10.3.6. Job creation for local labor or contractors?
    - 10.3.7. Economic stimulus to the area around the proposed site of the facility or to the economy of the state generally?
    - 10.3.8. The use valuable Arizona resources such as water to produce power for use outside of Arizona? Dormant commerce clause issues.

- 10.3.9. Balancing “need” or “environmental impact” differently if the power to be generated is meant to be used outside of Arizona? Dormant commerce clause issues.
- 10.4. Will Arizona continue to have a role in siting transmission lines in the future? A number of federal agencies entered into a Memorandum of Understanding on October 23, 2009, that tries to streamline the process for siting transmission projects on federal land that connect to renewable energy projects. Could the Committee and Commission become “cooperating agencies” within the meaning of the MOU? Should the Committee or Commission seek authority to act as “cooperating agencies” to participate in the federal line siting process associated with Arizona projects? Neither the Committee nor the Commission appear to have explicit statutory authorization to become a “cooperating agency.” See, e.g., A.R.S. §§ 45-105(A)(8) and 11-952.
- 10.5. Do the decisions of the Committee and Commission in the CECs take precedence over land use decisions of counties and cities? See, A.R.S. § 40-361.06(D).
- 10.6. Do the decisions of the Committee and Commission in the CECs take precedence over land use decisions made by state agencies like the Arizona State Land Department?
- 10.7. How can meaningful input from federal, state and local governments be integrated into line siting decisions for projects that cross land regulated by multiple jurisdictions to avoid duplication of evidence gathering and hearing holding while reducing the risk of conflicting decisions?